



April 11, 2001

Mr. Jeffrey Davis
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2001-1456

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 145894.

The police department of the Spring Branch Independent School District (the "district"), which you represent, received a request for "the reports and documentation made by the district and the investigating officer" pertaining to an incident at Thornwood Elementary School involving the requestor's child, including "a copy of [the investigating officer's] notes or whatever information was taken about [the incident]." You have submitted for our review as responsive to the request the investigative file of the district police department. You assert that this information is excepted from disclosure under sections 552.102(b) and 552.108(a)(2) of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the submitted comments, the exceptions you claim, and we have reviewed the submitted information.

At the outset, we note that the submitted information, in whole or in part, may be subject to required withholding under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 261.201 of the Family Code governs release of information related to reports of child abuse or neglect. In pertinent part it reads:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

The information provided indicates that the Houston Police Department and the district police department each investigated or participated in an investigation as a result of the incident, and the information also indicates that Child Protective Services was contacted. It is therefore possible that at least portions of the information relate to an investigation conducted by or for the Department of Protective and Regulatory Services (the "department") under chapter 261. See Fam. Code § 261.406(a) (the department shall perform an investigation of a report of alleged or suspected abuse or neglect of a child in a private or public school under the jurisdiction of the Texas Education Agency). You have not informed this office, nor are we able to ascertain, the extent to which the district provided these documents to the department, or the extent to which they are also held by the department or a law enforcement agency, for purposes of a chapter 261 investigation. To the extent that the submitted documents are also contained in the files of an investigation conducted under chapter 261 of the Family Code, we believe such information is made confidential by section 261.201 of the Family Code. We thus conclude such information must not be released to the requestor.¹ To the extent the submitted documents are not also contained in the files of an investigation conducted under chapter 261, such information is not made confidential by section 261.201 of the Family Code and may not be withheld under section 552.101 on that basis.

You indicate that student identifying information was redacted from the submitted documents in accordance with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. See also Gov't Code §§ 552.026, .114. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and

¹You have not cited any specific rule that the department or any investigating agency has adopted to permit release of such information to the requestor, nor are we aware of any such rule. Hence, we conclude such information must not be released. See, e.g., Open Records Decision No. 440 at 2 (1986). We note that the requestor, a parent of the child and subject to department rule, has a right of access to information pertaining to the incident that is held by the department. See Fam. Code § 261.201(g).

excepted from required public disclosure by section 552.026 of the Act without the necessity of requesting a decision from this office, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

In this instance, however, the information at issue evidently consists of records maintained by the district's police department. Records maintained by a law enforcement unit of an educational agency or institution that were created by that law enforcement unit for purposes of law enforcement are excluded from the definition of "education records" under FERPA. *See* 20 U.S.C. § 1232g(a)(4)(ii). It appears that, to the extent the submitted records contain student identifying information, such records were "created by [the district's] law enforcement unit for purposes of law enforcement." We thus conclude that FERPA does not apply to these records. Moreover, we advise that if the records did in fact constitute "education records" under FERPA, then to the extent the records pertain to the requestor's child, federal law would require that the records be made available to the present requestor. *See* 20 U.S.C. § 1232g(a)(1)(A) (granting parents an affirmative right of access to their child's education records). Because the records do not, however, meet the definition of "education records" under FERPA, FERPA is inapplicable to these records. Student identifying information contained therein is thus not subject to FERPA's confidentiality requirements and may not be withheld on that basis.² *See also* Open Records Decision No. 673 at 7-8 (2001) (decisions such as Open Records Decision No. 634 may be relied upon as a previous determination only so long as five criteria are met, including the criterion that all of the elements of law, fact, and circumstances are met to support the decision's conclusion with respect to the records at issue); Open Records Decision No. 634 at 3 n.3 (1995).

In relevant part, section 552.108 provides:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

²If you have further questions as to the applicability of FERPA to information that is the subject of a request under the Act, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 at 4 n.6, 9 (1995).

Gov't Code § 552.108(a)(2). Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); see also *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978).

You neither assert that the release of the submitted information would interfere with law enforcement, nor do you assert any provision of section 552.108 other than the above-quoted section 552.108(a)(2). You state that "the investigation *has not* resulted in conviction or deferred adjudication." (emphasis added). You also state that the "documents are part of a pending criminal investigation" and that the district police department "has made arrangements to present this matter to the district attorney's office . . ." Your representations thus indicate that the case remains active. By its express language as quoted above, however, section 552.108(a)(2) pertains to information that *did not* result in a conviction or deferred adjudication. This provision therefore applies only where the matter has reached a *final result* other than conviction or deferred adjudication. Your representations indicate the matter has not yet reached a final result, and we therefore conclude that section 552.108(a)(2) is inapplicable. Because you did not assert, nor have you argued, any other provision of section 552.108, we have no basis for concluding that the information is excepted under any other provision of section 552.108.

Section 552.102 states in relevant part that "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee" is excepted from disclosure, except the provision does not except from disclosure "the degree obtained or the curriculum[.]" Gov't Code § 552.102(b). We have marked the transcripts at issue to indicate the portions that consist of the "degree obtained" and "the curriculum." The information we have marked is not excepted from disclosure under section 552.102 and is subject to release except as otherwise provided herein. The district must withhold, pursuant to section 552.102(b), the remaining information in the submitted transcripts.

The submitted records include an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers and license plate number information, which we have marked, under section 552.130.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the district may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information at issue.

Finally, the social security numbers in the submitted documents may be subject to required withholding under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the information is not subject to FERPA, nor is it excepted from disclosure by section 552.108 of the Government Code. To the extent that the submitted documents are also contained in the files of an investigation conducted under chapter 261 of the Family Code, such information is confidential pursuant to section 261.201 of the Family Code and must be withheld. The submitted transcripts must be withheld under section 552.102(b), except the information in the transcripts that we have marked is not excepted by section 552.102(b). The I-9 form must be withheld in its entirety pursuant to section 552.101 and federal law. The driver's license number information we have marked must be withheld under section 552.130. The employee social security number, home address, home telephone number, and family member information we have marked must be withheld under section 552.117(1) only if the employee timely elected under section 552.024 to keep this information confidential. The social security numbers may otherwise be confidential under section 552.101 in conjunction with federal law, as provided above. The remaining information is not excepted from disclosure and is subject to release to the requestor.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

³Some of the information is or may be confidential with respect to the general public under provisions of law that are solely intended to protect the privacy of the requestor or the requestor's child. Because the requestor has a special right of access to this information beyond that of the general public, we do not separately address herein the information that is or may be protected from public disclosure by laws intended to protect the privacy of the requestor or the requestor's child. *See* Gov't Code § 552.023.

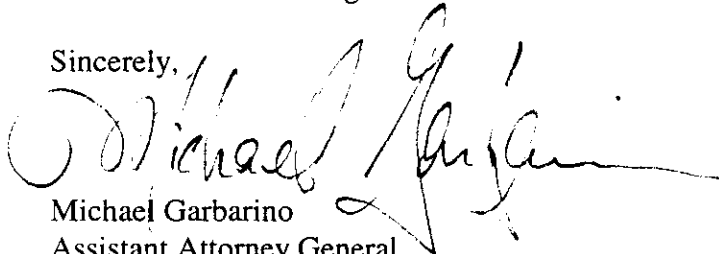
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", written over a horizontal line.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 145894

Encl. Submitted documents

bcc: (w/o enclosures)